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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL STEPHENS et al.,

Plaintiffs and Respondents,

v.

MARY GAUSTAD, as Trustee, etc.,

Defendant and Appellant.

G045073

(Super. Ct. No. A217826)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Luesebrink. (Retired judge of the Orange County Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgment affirmed in part and reversed and remanded in part.

Vogt, Resnick & Sherak, David A. Sherak and Jeany A. Duff for Defendant and Appellant.

Ascher & Associates, Ralph Ascher and Richard Vergel de Dios for Plaintiffs and Respondents.

* * *

INTRODUCTION

This appeal presents a number of interrelated issues of trust administration and a mixed bag of dispositions. The story in brief is this: In the last two years of her life, a trust was established by a mother for her three children. The mother became incapacitated. One of her children, the daughter, became the successor trustee. Later, after the mother had died, the trustee was accused of self-dealing with trust funds by one of the other two siblings. That sibling filed a petition seeking to have the trustee return certain property allegedly improperly transferred out of the trust. The case settled. The parties agreed to each bear their own attorney fees. Four years later, the trustee filed an accounting disclosing that she had paid the attorneys who represented her in the earlier litigation from trust funds. Then both other siblings, two brothers, filed a petition seeking redress for the payment of the trustee's attorney fees with trust funds. The judge ordered the trustee to pay back to the trust all the funds spent on the lawyers who had represented her in the earlier litigation identified in the accounting. He also ordered the trustee to pay back to the trust all funds she had claimed as compensation for her administration of the trust. The trial judge further ordered that the trustee pay to her two brothers directly an amount double that which he had ordered her to pay back to the trust. (See Prob. Code, § 859.) The trustee has now appealed.

We hand down a split decision. On the one hand, there is no question that the trustee paid attorney fees for the prior litigation out of trust funds. Those payments did not benefit the trust. They benefitted her personally. Her reliance on advice of counsel in making those payments was unreasonable. Also, the trustee paid herself, as a trust administration expense, for time defending her past alleged misconduct. Such sums

again did not benefit the trust. Accordingly we affirm the judgment to the extent it finds that the trustee violated her fiduciary duty not to self-deal with the trust.

On the other hand, the judgment requires the trustee to pay back some $5,000 in attorney fees which were properly ascribable to preparation of a trust accounting and were not related to the earlier litigation. That money did benefit the trust. Moreover, the award of double liability under Probate Code section 859 against the trustee was error. The two nontrustee siblings' claim against the trustee does not fit within section 850 of the Probate Code and therefore section 859 as well.

Finally, we affirm the judgment to the extent it provides that attorney fees are to be awarded the nontrustee siblings under section 17211 of the Probate Code. The trier of fact could reasonably conclude, in light of the trustee's flimsy advice-of-counsel defense, that her opposition to the nontrustee siblings' contest of an accounting was without reasonable cause and in bad faith. The *amount* of attorney fees to be awarded, however, is not before the court in this particular appeal. It is the subject of a companion appeal, case No. G045464.

As is often the case with family-related litigation, we refer to the related family member parties by their first names. No disrespect is intended. (E.g. *Estate of Kraus* (2010) 184 Cal.App.4th 103, 106, fn. 1.) All undesignated statutory references are to the Probate Code.

FACTS

In April 2000, with less than two years to live, 63-year-old Barbara Stephens established a trust for her three adult children, William, Michael, and the youngest, Mary. Barbara was the initial trustee. In the event of Barbara's death or incapacity, her daughter Mary was designated as the successor trustee. Barbara died in September 2001.

By February 2001 Barbara had become sufficiently incapacitated for Mary to become the trustee. In February 2001, the trust purchased a cabin in the Big Bear area. In early June 2001, Mary, acting as trustee, transferred the cabin to herself as her sole and separate property.

Sometime before May 2003, brother Michael learned of the transfer from the trust to Mary individually. In May 2003 Michael filed a petition in the trial court probate department seeking redress from Mary for the transfer. The petition sought relief under both sections 17200 and 850.

Mary claimed that the cabin had originally been built by her grandfather. It had sentimental family value. When it came up for sale, Barbara, then still alive, stated that she wanted to give the cabin to Mary. At the time, Barbara still retained the power to make gifts from the trust, Mary asserted that the cabin purchase was a bona fide gift from her mother and not an abuse of trust funds.

In November 2003, while Michael's petition was still pending, Mary filed an accounting. The parties call this the "first accounting." Mary amended the first accounting in early January 2004. The amended accounting showed four entries for monies paid to the firm of Stocker & Lancaster as legal expenses for "Mike's challenge." All four entries were in the year 2003. The total of these four entries was $9,289.96.

The case settled in July 2004. Mary paid Michael $40,000 out of her own money. The settlement agreement provided that each party would bear his or her own attorney fees. It also provided that any fees incurred to enforce the settlement agreement would be awarded to the prevailing party.

As part of the settlement, on August 18, 2004, Michael filed a withdrawal of "his objections to any and all Fiduciary Accountings or supplements to such accountings filed to date by" Mary. William had, for his part, signed a declaration the previous April stating he had no objections to the first accounting. Then later, in August,

just a few days after Michael filed his withdrawal of objections to all accountings to date, William also signed a general release of any claims arising out of the cabin transaction.

The trust continued to take in and disperse money. In April 2008, almost four years after the settlement, Mary filed an accounting for the period August 2003 (including part of the period leading up to the settlement) to January 2008. The parties call this the "second accounting."

Michael and William contended that three payments enumerated in the second accounting were inappropriate: (1) $18,124.93 in trustee compensation paid to Mary; (2) $27,267.37 paid to the firm of Stocker & Lancaster in 2004 and years following (that is, not including the 2003 payments listed in the first accounting); and (3) $5,005.35 paid to the firm of Vogt & Resnick (now Vogt, Resnick and Sherak, Mary's current lawyers). The two brothers attacked the accounting. They filed a petition under sections 17200, subdivision (a), and 850. They sought double damages under section 859. The petition sought an order requiring Mary to reimburse the trust for the fees spent on the attorneys and on trustee compensation for Mary herself. After a trial, the court ordered Mary to pay $52,189.65 to the trust, which meant that Michael and William would each receive one-third of the $52,189.65, or $17,396.55.

The court also ordered Mary to pay $169,820.80 to Michael and William pursuant to section 859.

The judgment originally proffered by Michael and William proposed that Mary return $84,910.40 to the trust, based in part on the contention that she should reimburse the trust $30,529.03 in fees paid to her current lawyers, Vogt Resnick & Sherak. But the trial judge struck the provision requiring the return of that money. (The striking of the amount is not the subject of a cross-appeal.) The amount paid to the Vogt firm which Mary is required to pay back is thus $5,005.35 instead of $30,529.03. Accordingly, the judgment provides that the total amount to be reimbursed to the trust is $52,189.65. But the trial judge failed to make a corresponding reduction in the

$169,820.80 provided for in section 859 double liability. On appeal, Michael and William concede that the judgment should be amended to make that correction. Hence the section 859 double liability as it comes to us in this appeal is really $104,379.30, not $169,820.80.

The judgment further provided that Michael and William were to recover their attorney fees under section 17211, subdivision (b). And the court subsequently awarded such fees in the amount of $175,000.

The notice of appeal was filed March 25, 2011, before the April order determining the amount of attorney fees awarded to Michael and William. ($175,000.) The opening brief thus raises no issue as to the reasonableness of the amount awarded, only whether fees should have been awarded at all. We have no occasion to address the reasonableness of the $175,000 in light of the reductions in the judgment which we direct in this opinion.

DISCUSSION

We will first examine whether Mary should be liable for breach of fiduciary duty. We conclude the answer is yes as to most, but not all, of the amounts provided in the judgment. We will then specify which amounts in the judgment are correct and which are not. Next we consider whether Mary should be doubly liable under section 859. Here the answer is no. We will finish with the question of whether Michael and William may recover attorney fees, a question which is best assessed in light of the rest of the case. Again, because Mary has not appealed from the order fixing the *amount* of fees, that issue is not before us in this appeal.

We begin with the presumption that the trial court judgment is correct and the burden is on appellant Mary to demonstrate error through an adequate record. (*Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1014.) But within our review, we recognize that, at trial, the initial burden was on

Michael and William to show a breach of fiduciary duty by Mary. Then the burden shifted to her to justify her payments. (See *Oates v. City of Lincoln* (2001) 93 Cal.App.4th 25, 35; *LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517.) We may also take as given that trustees may not self-deal. (§ 16004, subd. (a) ["The trustee has a duty not to use or deal with trust property for the trustee's own profit . . . ."].)

1. Mary's Liability for Breach of Fiduciary Duty

a. Mary's evidentiary arguments

Mary's brief presents three sets of arguments directed at the proposition that she did not violate her fiduciary duty, therefore she should not be liable at all. Mary complains (a) the trial court violated its own in limine order in allowing in evidence of the "validity" of the Big Bear cabin transaction and (b) the trial court did not allow her to be examined about certain documents, over objections that the documents spoke for themselves.

As to the argument that the trial court "improperly considered" evidence of the "validity" of the Big Bear cabin transaction, the evidence about which Mary complains merely established that (a) Mary paid William a settlement in the earlier litigation and (b) the settlement was paid by Mary personally, and not from trust funds. As such, those matters did not go to the "validity" of the transaction. They merely showed the circumstances of the transaction surrounding the settlement of the litigation. The evidence was independent of the question of whether the cabin transfer was proper.

As to the series of questions directly involving various exhibits connected to the 2003-2004 litigation, the trial court was within its discretion to exclude the proffered testimony as cumulative. (See *Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 143 [tested under abuse of discretion standard, no prejudicial error shown where trial court excluded cumulative evidence].)

b. the 2004 settlement

Mary's next argument substantively addresses the question of whether she violated her fiduciary duty. The argument is that, in light of Michael's and William's releases of all objections to the first accounting, the trial judge erred, as a matter of law, in concluding that she violated her fiduciary duty.

This argument is unpersuasive because the first accounting only included payments to Stocker & Lancaster made in 2003. The payments made to Stocker & Lancaster enumerated in the second accounting are all from 2004 or later. Thus there is no contradiction between Michael and William's release of objections to the first accounting and the idea that Mary had no right to make the payments listed in the second accounting. The fact that Michael and William, *as a part of a settlement*, waived objections to Mary's use of trust funds in 2003 to pay a law firm to defend her personally did not give her permission to use trust funds to do the same thing again *after* the settlement.

c. the advice of counsel defense

That leaves advice of counsel as Mary's last argument supporting her contention the trial court erred in finding she breached her fiduciary duty. The argument is that reliance on advice of counsel established Mary's good faith as a matter of law.

Advice of counsel usually crops up in contexts where bad faith is at issue. Thus it often appears in insurance bad faith litigation. (See *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 514-515; *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725; *Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 355-356; *Bertrero v. National General Corp.* (1974) 13 Cal.3d 43, 53-54 (*Bertero*); *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 872; *Davy v. Public National Ins. Co.* (1960) 181 Cal.App.2d 387, 396; see also *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 684.)

It also often appears as a defense to malicious prosecution actions. (See *Johnson v. Southern Pacific Co.* (1910) 157 Cal. 333, 338; *Dunlap v. New Zealand F. & M. I. Co.* (1895) 109 Cal. 365, 370-371; *Brinkley v. Appleby* (1969) 276 Cal.App.2d 244, 247; *Northrup v. Baker* (1962) 202 Cal.App.2d 347, 355; *Masterson v. Pig'n Whistle Corp.* (1958) 161 Cal.App.2d 323 (*Masterson*); *Hudson v. Zumwalt* (1944) 64 Cal.App.2d 866, 875.)

But advice of counsel does not automatically confer immunity from a claim of bad faith. Advice of counsel is only a "factor" in determining bad faith. (See *Masterson, supra*, 161 Cal.App.2d at p. 339 [noting that reliance must have been "in good faith" and "based upon a full and fair statement of the facts by the client" and only "may afford" a "complete defense to an action for malicious prosecution"]; see Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2011) ¶ 12:1249, p. 12D-24 ["Good faith reliance on advice of counsel is a factor in determining whether the insurer acted in 'bad faith.'"] (Rutter Group Insurance Treatise).) Advice of counsel does not *necessarily* prove the absence of bad faith. (Rutter Group Insurance Treatise, *supra*, at ¶ 12:1251, p. 12D-24.)

Most significant for our purpose here is the too-good-to-be-true rule developed in the case law. As our high court noted in *Bertero*, advice of counsel cannot be a "'mere cloak.'" (*Bertrero, supra,* 13 Cal.3d at p. 54, quoting *Walker v. Jensen* (1949) 95 Cal.App.2d 269, 274.) The advice cannot be "implausible." (Rutter Group Insurance Treatise, *supra*, at ¶ 12:1259, p. 12D-26 [no defense "where advice implausible"].)

Mary's argument that she committed no breach of fiduciary duty because she relied on counsel is untenable. We quote the argument in its entirety as it appears in her opening brief: "As the record reflects, Mary, as advised by her attorney, interpreted the provision of the Settlement Agreement stating that each party was to bear their own

costs to mean that, because she was the trustee and a party to the Settlement Agreement in that capacity, she was entitled to pay her litigation costs, as trustee, from the Trust."

This argument devolves into a non sequitur. Mary seems to be claiming that because her attorneys told her that each *party* should bear his or her own costs, the trust could bear her costs because she was a trustee. In context, the proposition is nonsensical. The whole point of the 2003 litigation was the claim that Mary had abused her position as trustee to use trust funds to buy a cabin for herself. It would be utterly unreasonable for anyone, with or without a law degree, to conclude that a contract clause ending that litigation by requiring each *party* to bear its own cost for that litigation would allow the trust to pay for one party's expenses but not the other's. The unreasonability of such a position is particularly true given that in 2003 Michael did not name Mary as a defendant in her capacity as trustee, but only personally.

2. Amount of Liability for Fiduciary Breach

a. Stocker & Lancaster fees

Mary shows no error in the trial court's conclusion that all $27,267.37 of fees paid by the trust to Stocker & Lancaster after the first accounting were attributable to her personal defense of the 2003 litigation. She makes only a brief reference to "expenses unrelated to the litigation of the 2003 Petition" but does nothing in her brief to show that Stocker & Lancaster billed for expenses that were, indeed, "unrelated" to the 2003 litigation. The second accounting merely lists payments to Stocker & Lancaster under the general rubric, "Legal Fees." The trust should not have paid for fees that were used to defend Mary personally against a charge of self-dealing. (See *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1231.)

b. Vogt & Resnick fees

Unlike the fees paid to Stocker & Lancaster, the $5,000 in fees paid to Vogt & Resnick had nothing to do with Mary's personal defense of the 2003 petition. The Vogt firm was engaged to prepare the second accounting, as Mary has shown by way of their initial invoices. Michael and William simply confine their argument to simply asserting that *Mary* was required to show that the fees paid to Vogt & Resnick benefitted the trust, and she didn't carry that burden.

This time the burden cuts the other way. It was Michael and William's burden to show that payment of fees to Vogt & Resnick was in breach of Mary's fiduciary duty. They articulate no theory by which fees to Vogt & Resnick necessarily inured to Mary's personal benefit, as distinct from that of the trust. But even if Mary did have the burden to show affirmative benefit to the trust, that burden was carried by the invoices showing retention to prepare the second accounting.

c. compensation to Mary herself

Mary kept extraordinarily detailed time records of her own work for the trust. She billed the trust during the period 2001 to 2008 between $35 and $45 an hour for her own time. On appeal, Mary asserts that the trial judge made no attempt to differentiate time spent on litigation, defending herself, from time spent on normal trust administration. Instead, the trial judge simply struck the entirety of the trustee compensation enumerated in the second accounting.

Mary is correct that the trial judge made no effort to separate properly billed fees from improper ones. But she cannot be heard to complain about it now on appeal. She waived the issue by not presenting it to the trial court. An appellate court ordinarily will not consider arguments made for the first time on appeal. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 ["the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the

consequences of which are open to controversy and were not put in issue or presented at the trial.'"].) At trial Mary testified that "all the items set forth in this exhibit [exhibit F is her detailed time records]" were "incurred in the furtherance of" her administration of the trust. But she cites us to nothing in the record where she proffered to the trial court any differentiation between her time spent on litigation defending herself (e.g., as one of her entries shows, time spent for a court appearance on a motion for summary judgment on January 16, 2004) from trust administration (e.g., as another of her entries shows, a meeting on April 7, 2005 to discuss the trust's tax return). Her strategy was obviously to give the trial court no choice but to give her the whole loaf or none. Given that the compensation records show at least some time spent working on her own defense, there was substantial evidence supporting the trial court's decision to strike the entire amount of compensation, and no basis on appeal now for apportionment.

3. Section 859 Double Liability

On appeal, Mary asserts that Michael and William, as beneficiaries, have no standing to make a claim under section 850, and, accordingly, should not have been awarded the double liability provided for in section 859. She is correct.

Authority on standing under section 850, and consequently the ability to claim double liability under section 859, is relatively sparse. The closest we have found is a plain statement in the Matthew Bender trust law treatise. That treatise states: "Beneficiaries and heirs do not have standing to request double damage liability [Prob. Code § 859]." (Hartog et al., Matthew Bender Practice Guide: Cal. Trust Litigation (2011) § 7.28[6], p. 7-61.) Unfortunately the treatise does not explain its position other than to cite section 859 itself. All the treatise does is to state, in the next sentence: "In order to recover double damages, liability under Prob. Code § 850(3) must first be established," and thereby suggest that beneficiaries and heirs do not come within the provisions of section 850.

The text of section 859 points to a need for standing under section 850. By its terms, section 859 limits its operation to property recovered "by an action under this part," and "this part" clearly refers to part 19 of Division 2 of the Probate Code, i.e., sections 850 through 859. Case law also supports the need to establish a right to recovery under section 850 before section 859 double liability may be awarded. (*Estate of Young* (2008) 160 Cal.App.4th 62, 90 (*Young*) ["conditions set forth in sections 850 through 857 must be proven before a damages entitlement under section 859 becomes operative and can be adjudicated as to amount"].)

Omitting provisions obviously inapplicable to this case (like those pertaining to conservators, minors and decedent-made contracts), section 850 reads: "(a) The following persons may file a petition requesting that the court make an order under this part: [¶] . . . . (2) The personal representative or any interested person in any of the following cases: . . . . [¶] (C) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another. [¶] (D) Where the decedent died having a claim to real or personal property, title to or possession of which is held by another. [¶] (3) The trustee or any interested person in any of the following cases: [¶] (A) Where the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest, is claimed to belong to another. [¶] (B) Where the trustee has a claim to real or personal property, title to or possession of which is held by another."

Michael and William assert that their claim against Mary fits subdivision (a)(3)(A), i.e., where "the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest, is claimed to belong to another." But subdivision (a)(3)(A) does not fit. Michael and William claim that the trustee transferred funds *out* of the trust. They do not claim that the trustee herself still holds "title" to the funds which were used to pay her earlier attorneys. (Cf. *Mota v. Superior Court* (2007) 156 Cal.App.4th 351, 356-357 [no need for beneficiary to file section 850 petition where

she "merely" sought reduction in amount of money other beneficiaries who had stolen property from trust would receive in final distribution].)

The only other candidate is subdivision (a)(3)(B), which refers to *claims* by a trustee to property held by others. But there is no claim here that Mary, as trustee, or even the trust itself, should get any money back from Stocker & Lancaster. No one here argues that Stocker & Lancaster did not deserve to be paid for their services *for Mary*. Rather, the claim here is that Mary improperly paid them for those services using trust funds which she should have paid herself.

Michael and William's claim fits into an entirely different sector of the Probate Code, part 5 of Division 9, sections 17000 through 17457. This part of the code is devoted to litigation involving trusts. Claims by beneficiaries involving improvident or self-dealing payments by trustees readily fit within section 17200's aegis over "the internal affairs of the trust," including specifically over "allowing payment of the trustee's compensation" and "[c]ompelling redress of a breach of the trust by any available remedy." (§ 17200, subds. (b)(9) & (b)(12).)

Michael and William make no argument that a claim properly made under section 17200, subdivision (b)(12), for redress of breach of trust by any "available remedy" ipso facto encompasses section 850. Their brief contains no mention of section 17200 at all. In the absence of any argument from Michael and William, we decline to uphold the trial court's double liability judgment on a theory that their section 17200 claim encompassed a section 850 claim as well. What is clear is Michael and William's claim, as beneficiaries based on payments by a trustee, does not fit within the text of section 850. Hence it was error for the trial court to award section 859 double recovery.

The best case for Michael and William's claim appears to be *Estate of Kraus*, *supra*, 184 Cal.App.4th 103 (*Kraus*). There, a sister established a trust. She was the initial trustee. As she was dying and semi-comatose, the sister signed a power of attorney to her brother. He then appropriated money that belonged to the trust, ostensibly

to preserve it for the sister's care. The sister died the day after the power of attorney was signed. The beneficiaries of the trust, two charities, obtained recovery from the brother under section 850 as well as double recovery under section 859. (*Id*. at p. 106.)

Kraus is different from the case before us in two material ways. The brother who appropriated money from bank accounts held in trust did so under a *void* power of attorney. (*Kraus, supra*, 184 Cal.App.4th at p. 112 ["David concedes that the power of attorney was invalid."].) Unlike the present case, the misappropriated money in *Kraus* was not paid out by the trustee acting in her capacity as trustee (even if in doing so she breached the trust). It was directly taken under the cover of a power of attorney. Also, in *Kraus* the successor trustee specifically assigned all claims to the beneficiaries. (*Id*. at p. 108.) Here, there has been no assignment by a trustee of claims which the trustee, as trustee, held against a third party. The *Kraus* case was thus one covered by section 850 subdivision (a)(3)(B) where a *trustee* does indeed have a claim to property in the possession of another.

4. Attorney Fees

This appeal concerns only whether the trial court had authority to award fees pursuant to section 17211, not whether the amount actually awarded ($175,000) was within the proper bounds of the court's discretion. Mary argues that the evidence was insufficient under subdivision (b) of section 17211. The statute provides for fees against a trustee where a trustee's opposition to an accounting contest was "without reasonable cause and in bad faith." In particular Mary asserts that the terms of the trust and the advice she received from counsel gave her reasonable cause to oppose Michael and William's contest. She claims she was "absolutely" entitled to pay her fees and attorney compensation from the trust estate. She adds the point that Michael and William were, in contesting her accounting, trying to relitigate the validity of the Big Bear cabin transaction.

The terms of the trust merely provided for trustee compensation and payment of attorney fees as the trust itself might require. They certainly did not confer on Mary a license to pay her personal expenses from trust funds. We have already dealt with her reliance on advice of counsel. That advice was too good to be true. And Michael and William were not contesting the "validity" of the Big Bear cabin transfer, only the attempt to use trust funds to pay for the fallout of the dispute over that transfer.

In light of our previous determination that the payments to Stocker & Lancaster were clearly improper, and that at least some of the trustee compensation was likewise clearly improper, we may conclude the trial court did not err in finding a bad faith opposition to the accounting contest.

Because section 17211 is enough to sustain *this* judgment in regard to attorney fees, we do not address Mary's argument that Michael and William are also not entitled to recover attorney fees as prevailing parties under the attorney fee clause of the 2004 settlement.

DISPOSITION

This is a split decision. We summarize the results:

(1) The judgment is affirmed to the extent it requires Mary to pay back to the trust out of her own personal funds the $27,267.37 paid to the firm of Stocker & Lancaster.

(2) The judgment is affirmed to the extent it requires Mary to pay back to the trust out of her own personal funds the $18,124.93 in trustee compensation paid to herself.

(3) The judgment is reversed to the extent it requires Mary to pay back to the trust the $5,005.35 paid to the firm of Vogt & Resnick.

(4) The judgment is reversed to the extent it requires Mary to pay to Michael and William jointly the sum of $169,820.80 as section 859 double liability. Mary is not liable under section 859.

(5) The judgment is affirmed to the extent it requires Mary to pay reasonable attorney fees for her bad faith opposition to Michael and William's contest of the second accounting.

For the convenience of both the trial court and the parties in any future proceedings, there should be only one judgment (as distinct from having to piece together what survived the appeal and what did not). We therefore direct the trial court, on remand, to enter an amended judgment tracking the results we hjust set forth.

Neither party has prevailed in this appeal. Accordingly, each side shall bear its own costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

KOLA, J.